LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
NOV 20 1964
JOHN F. DAVIS, CLERK

No. 645

In the

Supreme Court of the United States

OCTOBER TERM, 1964

WILLIAM H. LEGATE
Petitioner

v.

J. JOSEPH MALONEY, JR., RECEIVER,
Respondent

RECEIVER'S BRIEF IN OPPOSITION TO THE GRANT OF A WRIT OF CERTIORARI

MARCIEN JENCKES
Attorney for J. JOSEPH MALONEY, JR.
Receiver
30 State St., Boston 02109

Of Counsel:

CHOATE, HALL & STEWART
ROBERT M. GARGILL

PRESS OF GEO. H. DEAN CO., BOSTON

In the

Supreme Court of the United States

OCTOBER TERM, 1964

No. 645

WILLIAM H. LEGATE,
Petitioner

v.

J. JOSEPH MALONEY, JR., RECEIVER,
Respondent

RECEIVER'S BRIEF IN OPPOSITION TO THE GRANT OF A WRIT OF CERTIORARI

In accordance with Section 1 of Rule 24 of the Rules of this Court, the Respondent Receiver files this brief in opposition to the Petition for a Writ of Certiorari.

I.

Petitioner Legate's Petition for a Writ of Certiorari ignores applicable provisions of the Partnership Acts in effect in Massachusetts since 1922 and 1923 respectively, Mass. Gen. Laws, Chapter 108A (Uniform Partnership Act) and Chapter 109 (Limited Partnership Act), *infra* (pp. 6 and 7). Section 6(2) of the Uniform Partnership Act makes that Act applicable to "limited partnerships except

in so far as the statutes relating to such partnerships are inconsistent herewith." This specific provision was not repealed when the Limited Partnership Act replacing former ones was enacted in 1923.

Section 39 of the Uniform Partnership Act gives a rescinding partner only two rights against the partnership estate, neither of which could avail the Petitioner anything. The first right, under Clause (a), is to a "lien on . . . the surplus of the partnership property after satisfying the partnership liabilities to third persons." There is no such surplus here. The receivership estate is insufficient to satisfy all third party creditors. The second right, under Clause (b), is "to stand, after all liabilities to third persons have been satisfied, in the place of the creditors of the partnership for any payments made by *him* in respect of the partnership liabilities." (Emphasis supplied) He has made none.

Even if the law merchant under Section 29 of the Limited Partnership Act, *infra* (p. 7), could be said to apply here, that law did not in any way provide for a rescinding limited partner to have priority over customer creditors of the firm or their assigns.

> *In re Williams*, 297 F. 696 (C. A. 1, 1924), cert. den. 265 U.S. 593, involving facts which took place prior to the enactment of the Uniform Partnership Act and in which it was clearly stated (297 F. 704): "As respects creditors other than himself, Williams' right to payment of his advancements was deferred. . ."

It follows that there is no occasion whatever for a review of the Lower Courts' denials of Legate's efforts to rescind, because even if he could, his claim as a rescinding partner by statute comes after the unpaid claims of public customers, which aggregate $498,000 and on which nothing has been paid.

II.

Petitioner's statement on page 14 of his Petition that the claims which the Exchange had purchased for full value were subordinated to his claim based upon rescission cannot be supported. True, they were subordinated to the claims of other customer creditors as a part of the Receiver's Liquidation Plan. But the Petitioner's claim here is not that of a customer creditor. Obviously it would be no part of a liquidation plan proposal carefully designed to obtain funds with which to take care of public customers also to provide for prior payment of the claim of a limited partner for his capital, no matter what its basis. The lack of any such intention or possibility is inherent in the Ruling of May 1, 1962 by the District Judge (R. 70, 71), who, of course, knew the intention of his Receiver in proposing the Plan, and it shows in the clear language of the commitment letters attached hereto as Appendices R and R-1, *infra* (pp. 8-14), which as shown thereon were approved by the Judge. See particularly the last paragraph of the Receiver's letter to the Exchange dated December 10, 1962, Appendix R-1, *infra* (p. 13).

This effort by the Petitioner to establish priority for his claim for return of his limited capital is without sound basis, because those unpaid customer claims cannot possibly be affected by anything the Exchange may or may not have done prior to the receivership. The Petitioner does not attack the validity of the claims assigned to the Exchange's Nominee. They were purchased by the Exchange in good faith and for value. They were not subordinated as a matter of contract to any partner's claim. There is no basis in law or in equity absent a contract for subordinating them to the Petitioner's claim for the return of his capital.

It follows that there is no occasion for the issuance of a Writ of Certiorari on this second basis, because even if the Petitioner were entitled to rescind his partnership agree-

ment, he cannot have priority over the Assignee for full value of claims of bona fide public customers of the firm which are far in excess of the remaining assets of the receivership estate.

III.

The two decisions of this Court on which the Petitioner places reliance, *Silver* v. *New York Stock Exchange,* 373 U.S. 341, and *Securities and Exchange Commission* v. *Capital Gains Research Bureau, Inc.,* 375 U.S. 180, have no application at bar. The *Silver* case was not concerned with any right of rescission or priority of claims. It involved direct dealings between the Exchange and the plaintiff Silver relating to his right to continue to maintain direct wires with Exchange members without arbitrary interruption by the Exchange. The *Capital Gains* case involved dealings between public investors and an investment adviser. It arose under the Investment Advisers Act of 1940. Neither case had anything to do with rescission of a partnership agreement.

In this case at bar the Petitioner's claim for rescission against the receivership estate did not involve any sale of securities within the meaning of the Securities Act of 1933 or the Securities Exchange Act of 1934 by the insolvent firm or its managing partner, Mr. Homsey. The transaction between Legate and Homsey involved only contribution to the capital of a partnership. There was no sale of anything by Homsey or the firm which could come within the purview of the above or any other of the series of Congressional Acts enacted in the early 1930's "to eliminate certain abuses of the securities industry."

The 1959 transaction between Petitioner Legate and Mr. Homsey is one that was governed entirely by the common law and state statute law, as it was in effect in Massachusetts at the time the transaction occurred. The question is

one solely of local law between one subscribing to an interest in a partnership and the managing partner of the firm. It was not the type of transaction to which any of the federal Acts applied. It follows that there is no occasion to grant a Writ of Certiorari to review this entirely private dispute involving only local law.

CONCLUSION

The three reasons for granting a Writ set forth on pages 9 and 10 of the Petition are not sufficient basis for the issuance of a Writ of Certiorari because, as to reasons (a) and (b) the law involved is local law in a field not related to any federal statute, and as to reason (c) there is no interest on the part of the public investing and dealing in market securities in this case, which involves only one businessman's complaint against another not connected with investment by him, the Petitioner, in marketable securities.

It is therefore respectfully submitted that a Writ of Certiorari should not be issued to the United States Court of Appeals for the First Circuit to review that part of its decision which affirmed the denial of the Petitioner's claim for rescission.

Respectfully submitted,

MARCIEN JENCKES
Attorney for J. Joseph Maloney, Jr.
Receiver
30 State St.
Boston 02109
Massachusetts

of Counsel:
CHOATE, HALL & STEWART
ROBERT M. GARGILL

Boston, Mass.
Nov. 20, 1964

APPENDIX A

MASS. GENERAL LAWS

Chap. 108A (the Uniform Partnership Act):

SECTION 6. (1) A partnership is an association of two or more persons to carry on as co-owners a business for profit.

(2) . . . this chapter shall apply to limited partnerships except in so f... as the statutes relating to such partnerships are inconsistent herewith.

. . . . . .

SECTION 39. Where a partnership contract is rescinded on the ground of the fraud or misrepresentation of one of the parties thereto, the party entitled to rescind is, without prejudice to any other right, entitled—

(*a*) To a lien on, or right of retention of, the surplus of the partnership property after satisfying the partnership liabilities to third persons for any sum of money paid by him for the purchase of an interest in the partnership and for any capital or advances contributed by him; and

(*b*) To stand, after all liabilities to third persons have been satisfied, in the place of the creditors of the partnership for any payments made by him in respect of the partnership liabilities; and

(*c*) To be indemnified by the person guilty of the fraud or making the representation against all debts and liabilities of the partnership.

Chap. 109 (Limited Partnerships):

SECTION 15. A limited partner may receive from the partnership the share of the profits or the compensation by way of income stipulated for in the certificate; provided, that after such payment is made, whether from the property of the partnership or that of a general partner, the partnership assets are in excess of all liabilities of the partnership except liabilities to limited partners on account of their contributions and to general partners.

SECTION 16. (1) A limited partner shall not receive from a general partner or out of partnership property any part of his contribution until

(*a*) All liabilities of the partnership, except liabilities to general partners and to limited partners on account of their contributions, have been paid or there remains property of the partnership sufficient to pay them,

. . . . . .

SECTION 23. (1) In settling accounts after dissolution the liabilities of the partnership shall be entitled to payment in the following order:

(*a*) Those to creditors, in the order of priority as provided by law, except those to limited partners on account of their contributions and to general partners,

(*b*) Those to limited partners in respect to their share of the profits and other compensation by way of income on their contributions,

(*c*) Those to limited partners in respect to the capital of their contributions,

(*d*) Those to general partners other than for capital and profits,

(*e*) Those to general partners in respect to profits,

(*f*) Those to general partners in respect to capital.

(2) Subject to any statement in the certificate or to subsequent agreement, limited partners share in the partnership assets in respect to their claims for capital, and in respect to their claims for profits or for compensation by way of income on their contributions, respectively, in proportion to the respective amounts of such claims.

. . . . . .

SECTION 29. In any case not provided for in this chapter the rules of law and equity, including the law merchant, shall govern.

APPENDIX R

New York Stock Exchange
11 Wall Street
New York 5, N. Y.

November 10, 1960

W. Arthur Garrity, Jr., Esquire
As Receiver of DuPont, Homsey & Company
and Not Individually
31 Milk Street
Boston 9, Massachusetts

Dear Mr. Garrity:

This letter sets forth the agreement of the New York Stock Exchange with you as Receiver of DuPont, Homsey & Company ("the firm") pursuant to which you have, at our request, filed with the U. S. District Court for the District of Massachusetts a plan for partial liquidation of the firm. You have made therein certain representations concerning the firm's abilities to meet its obligations to creditors in the course of liquidation. A copy of the said plan is attached hereto and incorporated herein by reference and made a part thereof. Our agreement is made in consideration of your having filed the said plan and the accompanying documents seeking its approval.

You represent in the said plan that the plan is based upon a proposal made by us that we will acquire the subordinated claims of five claimants against the firm, known as the "special claimants," and that such acquisition will result in eliminating claims totaling approximately $690,000 against a single and separate fund for customer creditors and thereby relieving the general creditors' fund from these

claims until all other creditors have been paid in full. Since you filed your plan the dollar amount of these claims has been increased from approximately $690,000 to approximately $763,000. We agree that the following are the special claimants referred to, and that the amounts set after their names are the amounts for which their respective escrow agreements in the form annexed to your plan will provide:

1. Estate of John C. Miller of Palm Beach, Florida, represented by Walter D. Malcolm, Esq., Bingham, Dana & Gould, One Federal Street, Boston, Mass.	$311,250.00
2. Marie M. Miller of Palm Beach, Florida, represented by Walter D. Malcolm, Esq., Bingham, Dana & Gould, One Federal Street, Boston, Mass.	110,325.00
3. Estate of George Dahood, represented by George J. Shagory, Esq., 92 State Street, Boston, Mass.	32,017.96
4. Dr. Francis S. and Anna B. Keating of Pompano Beach, Florida, represented by John L. Casaly, Esq., 6 Main Street, Natick, Mass.	110,000.00
5. Manja Tritsch of Boston, Mass., represented by Mark M. Horblit, Esq., 84 State Street, Boston, Mass.	200,000.00
TOTAL	$763,592.96

The Exchange will enter into an escrow agreement in the form attached to the plan as Exhibit B with any of these claimants who approves the escrow agreement and agrees that the amount set after his or her name is the maximum

amount of his claim against DuPont, Homsey & Company or its Receiver, except for his open account positions held by you.

The plan filed by you furthermore represents to the Court that we have agreed to make available to you up to a certain stated amount of additional funds to take care of priority expenses fixed by the Court, if the assets of the Receiver remaining after the payment of properties and of customers' and creditors' claims which have not been barred are not sufficient therefor. You and we acknowledge and agree that the maximum amount which we have agreed so to make available is $215,000 and that this amount shall also be available for the payment by you of any bona fide customer claim not fully satisfied as provided in paragraph 14 of the plan (without reference to the value of the assets in the receivership estate which are required for the payment of general creditors), in such proportions and amounts as the Court may direct on your ex parte application. We agree to pay any such amounts (not exceeding $215,000 in the aggregate) to you upon your written request received by us prior to the termination of the receivership. We expect that approximately $65,000 of the said $215,000 may be used by you for the payment of four or more customer claims arising out of misappropriations occurring in the firm's Worcester branch office when proved to your satisfaction, that there may be similar claims arising during the course of your liquidation which may be similarly paid, and that we will have the benefit of any net recoveries you may make with respect to such claims.

You and we agree that all obligations of the Exchange under the plan, the escrow agreements and this undertaking are subject to the fulfillment to our satisfaction of all of the conditions set forth in paragraph 7 of your plan and shall terminate if at any time before the establishment of the escrow funds a petition in bankruptcy is filed by or against the firm unless such petition is dismissed within

thirty days, and if, after the escrow funds are established, any such petition is filed and not so dismissed, our obligation hereunder will be limited to the payment of priority expenses as determined by the Court.

Very truly yours,

NEW YORK STOCK EXCHANGE

By Edward C. Gray
Executive Vice President

Accepted:

W. ARTHUR GARRITY, JR.
Receiver

Approved by U. S. District Court for the District of Massachusetts this 10th day of November, 1960.

FRANCIS J. W. FORD

APPENDIX R-1

DUPONT, HOMSEY & COMPANY
W. Arthur Garrity, Jr., Receiver
31 Milk Street
Boston 9, Massachusetts

December 20, 1960

New York Stock Exchange
11 Wall Street
New York 5, New York

Dear Sirs:

This is in reference to your proposal to remove Mrs. Rita H. Dahood and the Estate of Emory D. Heald as

substantial claimants against the estate of duPont, Homsey & Company and Anton E. Homsey by establishing separate escrow funds in the form of the Exhibit B attached to the Receiver's Plan for Partial Liquidation for the benefit of Mrs. Dahood and that Estate in an amount not to exceed $20,000 for Mrs. Dahood and $15,000 for the Heald Estate, funds for which will come from the $215,000 fund the Exchange has undertaken to provide in its letter to me dated November 10, 1960.

The Exchange may accept this letter as my approval to such use of not more than $35,000 of the $215,000 commitment, it being understood that as between us, said $35,000 will be deemed to have come from the $65,000 referred to in the last sentence of the next to last paragraph ending on page 3 of the Exchange's letter dated November 10, 1960, and that the last clause of said sentence is hereby amended subject to the approval of the Court to read as follows: "and that we will have the benefit of any net recoveries in excess of $35,000 you may make with respect to such claims."

I further understand that any part of the $35,000 above referred to not used in settlement of those two claims will revert directly to the $215,000 fund.

It is further understood that this proposed settlement of the claims of Mrs. Dahood and the Heald Estate against the aforesaid receiverships does not reduce or otherwise affect any and all claims which W. Arthur Garrity, Jr., Receiver of duPont, Homsey & Company and Anton E. Homsey, may have against Rita H. Dahood, her heirs or assigns.

The Escrow Agreement for the benefit of the Estate of John C. Miller authorized you to instruct the Escrow Agent to pay from the escrow deposit to persons claiming a lien on certain securities such sums as you may direct, against

delivery of the securities to the Escrow Agent. I understand that your counsel and counsel for the Harvard Trust Company have agreed that as soon as the present restraining order obtained by Cecil Rose against the Harvard Trust Company is lifted, the Trust Company will deliver 4,000 shares of The Mengel Company stock to the Escrow Agent against receipt of $16,000, and that under the provisions of the Escrow Agreement the Escrow Agent will on receipt of such stock pay $160,000 to you from the escrow fund. You have advised me that you are willing to make an additional $160,000 available to me on the terms and conditions set forth in our letter agreement of November 10, 1960 and those hereinafter set forth.

In consideration of my proceeding promptly with the consummation of the Receiver's Plan for the Partial Liquidation of duPont, Homsey & Company to the fullest extent permitted by the assets of the receivership estate of duPont, Homsey & Company (including assets to which the Receiver is or may be entitled or which he may receive), you agree to make available to me an additional amount of $160,000 (whether or not you receive that sum from the Harvard Trust Company) which the Receiver may, if the assets of the receivership estate are not sufficient therefor, use to pay priority claims, claims of customers and claims of creditors, but neither the $215,000 provided for in the November 10, 1960 letter nor the additional $160,000 provided for in this letter is to be used to pay claims of general or limited partners for their capital contributions,

profits, interest, or other compensation for their capital contributions.

Very truly yours,

W. ARTHUR GARRITY, JR.

W. Arthur Garrity, Jr.
Receiver

The New York Stock Exchange hereby agrees to the above, including the amendment to the letter dated November 10, 1960, this twentieth day of December, 1960.

NEW YORK STOCK EXCHANGE

By Edward C Gray
Executive Vice President

Approved by the U.S. District Court for the District of Massachusetts this 20th day of December, 1960.

FRANCIS J W FORD